UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE

IRVING READY-MIX, INC.

and

CASES 25-CA-31485 25-CA-31490 Amended 25-CA-31548

CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 414, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS

RESPONDENT IRVING READY-MIX, INC.'S REPLY BRIEF TO ANSWERING BRIEF OF CHARGING PARTY CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 414 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS TO RESPONDENT IRVING READY-MIX, INC.'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Irving Ready-Mix, Inc. ("Irving"), by counsel, hereby submits its reply to the Answering Brief of Charging Party Chauffeurs, Teamsters & Helpers Local Union No. 414 a/w International Brotherhood of Teamsters (the "Answering Brief"). The Chauffeurs, Teamsters & Helpers Local Union No. 414 a/w International Brotherhood of Teamsters (the "Union") raises three (3) broad categories of argument in its Answering Brief and Irving replies to each, in turn.

I. <u>Irving's Failure to Make a Contribution to It's Employee Retirement Fund Did Not Constitute a Unilateral Change in Pension Benefits In Violation of Section 8(a)(1) and (5) of the Act.</u>

The Union takes issue with Irving's Exceptions Nos. 1, 2 and 3 in the first section of its Answering Brief. In Irving's Exceptions Nos. 1 and 2, Irving takes exception to, among other things, the ALJ's factual findings regarding Irving's contractual obligation to make retirement fund contributions, the methods of determining benefit payment eligibility and the dates on which benefit payments were due. (See Irving's Exceptions to Administrative Law Judge's Decision, pp. 1-8.)

Section 102.46(d)(2) of the National Labor Relations Board Rules and Regulations requires that "[w]here exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding". This section of the Union's Answering Brief is devoid of any citation to the record. (See Answering Brief, pp. 2-5). Instead it provides only conclusory statements. For that reason, Irving respectfully submits that the Union's unsupported rendition of facts in support of its argument on the issue of Irving's retirement fund contributions should be disregarded. Each of the cases cited by the Union in support of its argument on this issue are distinguishable based upon the facts of record.

The Union cites to Rapid Fur Dressing, Inc., 278 N.L.R.B. 905, 906-907 (1986) for the proposition that "not making payments to a pension fund without prior notice or consent of the Union equals a failure and refusal to bargain and is a violation of Section 8(a)(5) and (1). (Answering Brief, p. 3). The employer in Rapid Fur Dressing, Inc. admitted to having failed and refused to make contractually required pension fund contributions as alleged in the amended complaint filed against it. 278 N.L.R.B. at 905. There is no reference in that case, which was decided by way of an uncontested Motion for Summary Judgment, concerning any of the employer's dealings with the union on the non-payment issue. The fact that the employer admittedly refused to make payments suggests that the employer repudiated the obligation to make required payments, which is directly opposite to Irving's situation.

The record of the instant case shows clearly that while Irving failed to make a required retirement fund payment in September 2009 due to a lack of cash (Tr. 64, 300, 303, 311, 364), Irving has never voluntarily refused to make any payment or made any effort to evade its obligation to make

required contributions. (Tr. at 65; GCX 6 and 7 at pp. 2-3, respectively). Instead, Irving brought the Union into the process to meet with Irving's retirement fund financial advisors and go over available options. (Tr. 64-65; 302-303). Irving voluntarily entered into a federal program designed to assist in developing a plan to make required payments (Tr. at 310). Irving respectfully submits that its situation and its transparent reaction to the problem, meeting with the Union and owning up to its obligation to pay despite its current inability to pay, sets it far apart from the employer in Rapid Fur Dressing, Inc., whose conduct and apparent failure to engage the Union, or the unfair labor practice complaint process, left the Board with no option but to find a Section 8(a)(5) and (1) violation.

The Union cites to Republic Dye and Tool Co., 343 N.L.R.B. 683-686 (2004) for the proposition that "an employer's failure to make payments to benefit funds constitutes a repudiation of the collective bargaining agreement." (Answer Brief, p. 3). The employer in that case methodically planned and executed a reduction in wages and benefits as a cost cutting measure despite the union's protests and refused to provide the union with requested information to substantiate the company's financial condition. 343 N.L.R.B. 683-686. Irving's September 2009 fund payment included Irving's union represented and non-union represented employees. (Tr. at 310) As testified by George Gerdes, the Union's President, he learned at a meeting with Irving's retirement fund financial advisors that Irving's lending bank denied Irving the opportunity to borrow the money for the retirement account payment due to Irving's cash flow problems (Tr. at 65-65), As Irving's information confirmed by Irving's General Manager. (Tr. at 302-303). Secretary/Treasurer testified, Irving tried, but was unsuccessful in finding another bank willing to accept Irving. (Tr. at 247). Irving did not formulate and execute a plan to violate or repudiate its contractual obligation to make retirement fund payments for all of its eligible employees, and it

never denied the obligation to make required payments as was the case in <u>Republic Dye</u>. It simply was unable to make a required payment.

Finally, the Union cites Merrill & Ring, Inc., 262 N.L.R.B. 392, 394-95 (1982) for the proposition that an employer's unilateral change of a jury duty provision in a collective bargaining agreement without bargaining is a violation of Section 8(a)(5) of the Act. (Answering Brief, p. 3). Again, as stated before, Irving did not make a voluntary and unilateral decision to change its contractual obligation and never refused to make the payment. Irving did not have the cash to pay even just the portion of the September 2009 payment amount owing on behalf of its CBA covered drivers had it been lawfully able to separate that pool of employees apart from its other employees at issue. (Tr. at 310-311). Contrary to the Union's assertion about Irving's ongoing obligation to make delinquent retirement fund payments (Answering Brief, p. 3-4), Irving voluntarily entered into a federal program to work its way through the delinquency payment process. (Tr. at 310-311). Irving is committed and has committed itself to seeing the problem resolved.

Contrary to the Union's claim, Irving respectfully submits that the facts of this case make it appropriate for the Board to find that the missed retirement fund contribution at issue does not qualify as a violation of Section 8(a)(5) and (1) of the Act for the reasons set out in the dissenting opinion in Rapid Fur Dressing, 278 N.L.R.B. at 907-909. There is no indicia of any violation of Section 7 rights since Irving's CBA covered as well as non-CBA covered employee's were affected by the missed retirement fund payment in September 2009. (Tr. at 304, 310). Meeting with the Union prior to missing the payment would have been fruitless since the retroactively calculated debt was owed and Irving was unable to borrow the money necessary to cover the cost. However, Irving was open with the Union about the problem and brought the Union in to meet with its fund financial

advisors (Tr. at 62-64). Irving did not deny the debt and voluntarily entered into a government program to come up with a plan for payment. (Tr. at 310). The facts of this case do not reflect those of the cases cited by the Union which involve clear and voluntary failure and refusal to pay.

The Union's reliance on <u>Castle Hill Health Center</u>, 355 N.L.R.B. No. 196, slip op. at 37-38 for the proposition that Irving's failure to make a required retirement fund contribution in September 2009 constitutes a "continuing obligation" which extends the Section 10(b) limitation period is misplaced. The "continuing obligation" theory in <u>Castle Hill Health Center</u> related to the employer's defense to the charge against it based upon the Funds' return of prior submitted pension contribution checks to the employer. 355 N.L.R.B. at 37-38. That defense was denied. It was determined that the employer had a "continuing obligation" to make contributions to the Fund regardless of the Fund's failure to perform its function in a diligent fashion. (Id.)

Irving's required retirement fund contributions were designed to be made on a once per year, retroactive basis (Tr. at 302-303). The contribution at issue was due in September 2009. (Tr. at 300). In September 2009, the Union was admittedly aware of the fact that the fund payment was not made. (Tr. at 64-65). On December 4, 2009, the Union was provided with written notice of the detailed amount of the calendar year 2008 benefit payment that was due but not paid in September 2009. (Tr. at 299-300; Rx 24). December 4, 2009 would have been the absolute outside date for showing when the Union had actual, clear and unequivocal notice of the missed retirement fund payment in September 2009. The original unfair labor practice charge filed against Irving alleging a unilateral change in terms of employee retirement plans "[s]ince on or about June 1, 2010" was not filed until July 26, 2010 (GCX 1(g)).

In <u>Castle Hill Health Center</u>, the Board affirmed the ALJ's decision that a charge regarding a unilateral change in pension fund contribution must be filed within the 10(b) period, six (6) months, of the Union's receipt of "actual or constructive of the unfair labor practice". 355 N.L.R.B. at 37. Clearly, the charge filed against Irving on July 26, 2010 was outside the 10(b) period which began to run, at the latest, on December 4, 2009.

The Union's efforts to side-track the Section 10(b) issue by claiming that Irving failed to preserve that defense must be denied. There was no evidence presented at the hearing in this case to prove any change in employer pension benefits on or about January 26, 2010 as alleged in the Consolidated Complaint. (GCX 1(i) at ¶7(a)). The Consolidated Complaint obviously was crafted to allege only matters that could be "timely" as related to the Union's unfair labor practice charge filed on July 26, 2010.¹ The Union now relies upon a continuing obligation theory related to an event that occurred in September 2009 without notice to Irving, and then blames Irving for not appropriately raising a Section 10(b) defense. Irving timely raised the defense but the specific issue to which it could be applied was not itself identified and timely raised.

The <u>Castle Hill Health Center</u> case cited by the Union shows that the proper means by which the issue, at least as now argued by the Union, should have been raised. Therein, the Complaint, as amended at the hearing, alleged that the employer unilaterally refused and failed to make pension fund contributions since on or about February 1, 2007, based upon an unfair labor practice charge filed on April 9, 2009. 355 N.L.R.B. at 35. The date of the actual alleged violation was identified

¹ In retrospect, perhaps the Consolidated Complaint was drafted with the thought that weekly, rather than annual, fund payments were made and the effort was to reach back for as many weekly payments as possible. However, as was shown at the hearing, annual rather than weekly contributions were the practice, but the Consolidated Complaint was not amended.

in the Complaint, as amended, so that the issue of the Section 10(b) timing based upon the Union's actual or constructive knowledge of the alleged unlawful act in comparison to the date of the unfair labor practice charge filing was clearly at issue. There was no attempt to confuse or hide the issue presented for resolution.

Further, Irving's inability to make a required retirement fund payment in September 2009 was relevant to the existence of and the Union's knowledge of Irving's financial plight pertinent to other issues raised in the Consolidated Complaint, including bargaining issues resolved by the ALJ in Irving's favor. (See ALJ Order p. 19, lines 23-25). As a result, this is not a case where someone can legitimately claim that Irving litigated the issue and thereby forgave Counsel for Acting General Counsel's failure to amend the Consolidated Complaint to raise the issue.

II. <u>Irving is an Employer Engaged Primarily In the Building and Construction Industry</u> and Its Relationship With the Union was Properly Governed Under Section 8(f) Rather than Section 9 of the Act

The Union correctly notes that Irving argues the Board's decision in <u>J.P. Sturrus Corp.</u>, 288 N.L.R.B. 668 (1988) was improperly decided. (Answering Brief, p. 5). Rather than attempting to find fault with the validity and accuracy of the information provided in Irving's Exceptions Nos. 5, 6, 7, 8 and 9 which show why, under an appropriate Section 8(f) analysis, Irving's prior CBA and relationship with the Union were properly governed under Section 8(f) of the Act, the Union chooses to simply fall back on the on the <u>J.P. Sturrus</u> holding. It does so without any analysis of it as provided in Irving's Exception No. 4 and then claims, despite that analysis provided by Irving, that Irving has failed to distinguish its case from the facts presented in <u>J.P. Sturrus</u>.

Irving did distinguish its factual situation from the ready-mix concrete truck work determined to be not covered under the work at the site proviso to Section 8(e) in <u>Teamsters Local 294 (Island</u>

Dock Lumbar, Inc.) 145 N.L.R.B. 484 (1963), enfd, 342 F.2d 18 (2nd Cir. 1965) and Teamsters Joint Council 42 (Inland Concrete Enterprises, Inc., 225 N.L.R.B. 209 (1976). Those are the cases on which J.P. Sturrus was based and neither referenced the amount of work time a ready-mix truck or boom truck driver spent on construction sites. Irving's ready-mix truck drivers spend an average of 30-35% of their total paid work time on job sites where they perform hauling and power equipment operation work. (Tr. at 342). Irving believes that qualifies as a substantial portion of their paid work time and, therefore, their job duties make them eligible for coverage as employees engaged in the building and construction industry under Section 8(f) of the Act. See Techno Construction Corp., 333 N.L.R.B. 75, 79, 83-84 (2001).

The Union's argument offers no explanation for how the <u>J.P. Sturrus</u> decision transmogrified the Section 8(e) work at the site holdings concerning ready-mix truck drivers in <u>Island Dock Lumber</u>. <u>Inc.</u> and <u>Inland Concrete Enterprise</u>. <u>Inc.</u> into a finding on a ready-mix concrete employer's Section 8(f) status. Instead, the Union simply rests on <u>J.P. Sturrus</u> and claims that Irving has "offered no case law, or any additional analysis, which would cause the Board to reject" <u>Sturrus</u>. (Answer Brief at 6). Again, Irving respectfully submits that it did provide that case law and analysis in its Exception No. 4 and respectfully requests that the Board revisit, review and disregard or overturn <u>J.P. Sturrus</u> for purposes of its analysis and decision-making in the instant case.

III. The New Allegation that Derek Ray Unlawfully Interrogated Employee Applicants Should be Dismissed

Contrary to the Union's assertion, Irving denies that the unlawful interrogation claim raised for the first time by the ALJ in his Decision was fully litigated. (Answer Brief at p. 7). Without notice of the claim, Irving could not have had the opportunity to adequately litigate the matter. Ray

testified that he wanted to know if someone would be willing to drive for Irving in the event of a strike, when there would be a need for drivers, to prepare Irving for a possible strike. (Tr. at 321-322). What that "essentially" referred to in relation to the Union, as framed by Union's counsel in his question to Ray at the hearing, was whether or not the applicant was willing to cross a picket line in a strike. (Tr. at 169). Ray agreed to that essential reference, but that does not automatically mean that he admitted to directly asking an applicant if the applicant would cross a picket line. A description of the possible circumstances that could confront an applicant does not automatically equate to an interrogation regarding the applicant's position. Irving contends that it was improperly denied the opportunity to defend this previously undisclosed charge.

CONCLUSION

For all of the foregoing reasons, Irving Ready-Mix, Inc. respectfully requests that the Board grant its Exceptions to the Administrative Law Judge's Decision in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of February, 2011, a true and correct copy of the above and foregoing was forwarded by electronic mail to the following parties:

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